

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Cynthia Diane Stephens, P.J., Joel P. Hoekstra and Deborah A. Servitto, JJ.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

THEODORE PAUL WAFER

Defendant-Appellant.

Supreme Court No. 153828

Court of Appeals No. 324018

Circuit Court No. 14-000152-01

WAYNE COUNTY PROSECUTOR

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DEFENDANT-APPELLANT'S

SUPPLEMENTAL BRIEF

(ORAL ARGUMENT REQUESTED)

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Statement of Jurisdiction

Mr. Wafer appealed by right to the Court of Appeals pursuant to Const 1963, art 1, §20; MCL 600.308(1); MCL 770.3; MCR 7.203(A); and MCR 7.204(A)(2) following the sentences imposed for his convictions by jury trial. He timely filed an application for leave to appeal in this this Honorable Court following the Court of Appeals' opinion. MCR 7.303(B)(1). See also the Statement of Jurisdiction in Mr. Wafer's application for leave to appeal. On reconsideration, this Court granted oral argument on the double jeopardy claim in Mr. Wafer's application. *People v Wafer*, ___ Mich ___, 943 NW2d 379 (2020); 186a-187a.

Statement of Questions Presented

- I. Are Mr. Wafer's convictions and sentences for violations of both MCL 750.317 (second-degree murder) and MCL 750.329 (statutory manslaughter) for the same death a double jeopardy violation? Must the manslaughter conviction be set aside, and the case remanded for resentencing on the second-degree murder conviction?
 - A. Must the statutory language "but without malice" in MCL 750.329 be given meaning and effect? Did the Legislature intend second-degree murder and statutory manslaughter to be mutually exclusive offenses?
 - B. Do this Court's precedents in *People v Strawther*, *People v Smith*, and *People v Doss* not compel a different conclusion? In fact, do they support the conclusion that convictions and punishments for both murder and statutory manslaughter for the same death are prohibited, because to hold otherwise given those decisions would mean that the words "but without malice" in MCL 750.329 have been entirely read out of the statute by the judiciary?
 - C. Is the proper remedy to vacate the manslaughter conviction and to remand for resentencing on the remaining greater offense of second-degree murder?

Court of Appeals answered, "No."

Circuit Court answered, "No."

Theodore Paul Wafer answers, "Yes."

Statement of Facts

There was no dispute that Theodore Wafer shot Renisha McBride causing her death. The trial was about whether Mr. Wafer's act was legally justified or excused and if not, then what was the level of his criminal culpability in killing her. (X 101-171, 2a-72a; XI 29-103, 73a-147a).¹

The Court of Appeals succinctly summarized the facts:

On November 2, 2013, at approximately 4:30 a.m., defendant shot and killed 19-year-old Renisha McBride on the front porch of defendant's home in Dearborn Heights. McBride had been in a car accident before the shooting, and it is uncertain how or why she came to be at defendant's home. She had marijuana in her system and her blood alcohol level was .218. Defendant admitted that he shot McBride, but he asserted at trial that he did so in self-defense because he thought McBride was trying to break into his home. However, the evidence showed that McBride was not armed at the time of the shooting, and she possessed no burglary tools. (COA opinion, majority opinion, p 1; 172a.)

The jury convicted Mr. Wafer of second-degree murder, MCL 750.317; manslaughter - weapon aimed, MCL 750.329; and felony firearm, MCL 750.227b, on August 7, 2014, in the Wayne County Circuit Court, before the Honorable Dana M. Hathaway. (XII 9, 148a; Judgment of Sentence, 171a). During the discussion of jury instructions prior to the verdict, defense counsel objected—and the prosecutor agreed—that if Mr. Wafer were convicted of both second-degree murder and statutory manslaughter, then one of the convictions would need to be set aside to comply with

¹ The trial transcripts are referred to by volume/day number.

due process as there was only one death.² (X 126-128, 27a-29a). But after the verdicts, the prosecution changed course and opposed the defense's objection at the sentencing hearing. (S 14-21, 149a-156a).³ At sentencing, defense counsel also objected to the scoring of Prior Record Variable (PRV) 7 at 10 points on the basis of the concurrent statutory manslaughter conviction for the same reasons.⁴ (S 14-16, 149a-151a). The court overruled the defense objections, and the manslaughter conviction stood and was scored in PRV 7 as a concurrent conviction, resulting in a sentencing guidelines range of C-II (180-300 months/life) for second-degree murder. (S 15-21, 150a-156a).

Sentencing occurred in 2014, prior to this Court holding in *People v Lockridge*, 498 Mich 358, 394 (2015), that the sentencing guidelines ranges could only be used in an advisory capacity. Mr. Wafer requested a sentence below the then-mandatory sentencing guidelines range calculated for second-degree murder and offered the judge what he believed were substantial and compelling reasons to depart downward. (S 28, 30-37, 157a, 159a-166a). The court found that the proffered reasons did not meet the substantial and compelling standard, and imposed a sentence for second-degree murder that was at the bottom of the calculated 180-300 months/or parolable

² The prosecution charged Mr. Wafer with second-degree murder and statutory manslaughter; the prosecution additionally requested instruction on common-law involuntary manslaughter as a necessarily lesser-included offense of second-degree murder. (See Felony Information, 1a; X 126-128, 27a-29a).

³ "S" refers to the transcript of the sentencing proceeding held on September 3, 2014.

⁴ Under PRV 7 (Subsequent or concurrent felony convictions), one concurrent conviction is scored at 10 points. MCL 777.57(1)(b). A felony firearm conviction cannot be scored. MCL 777.57(2)(b).

life (C-II) range.⁵ (S 38-40, 167a-169a; Judgment of Sentence; 171a; Sentencing Information Report [SIR], 170a). The court sentenced Mr. Wafer to concurrent prison terms of 15 years to 30 years for the second-degree murder conviction and seven to 15 years for the manslaughter conviction, both consecutive to a two-year term for the felony firearm conviction. (S 38-40, 167a-169a; Judgment of Sentence; 171a.)

The Court of Appeals affirmed Mr. Wafer's convictions, but split on the double jeopardy claim. On that claim, the majority held that Mr. Wafer was not entitled to relief under *People v Miller*, 498 Mich 13 (2015), explaining that in its view "[n]either statute includes language that plainly indicates whether or not the Legislature intended to authorize multiple punishments." COA opinion, majority opinion, p 9; 180a. The majority went on to find that the two offenses were not the same for double jeopardy purposes under the *Blockburger/Ream* same-elements test. *Id.* The Honorable Deborah A. Servitto dissented on this issue. She would have held that the statutory language plainly evinced a double jeopardy violation and granted relief, explaining:

There would have been no need to add the limitation "but without malice" in the manslaughter statute had the Legislature intended to authorize dual punishments for both second degree murder and manslaughter under these circumstances. Rather, the Legislature would have simply remained silent on the *mens rea* element. The fact that it did not do so supports a conclusion that the Legislature expressed a clear intent in the manslaughter statute to prohibit multiple punishments for manslaughter and

⁵ The Court of Appeals remanded for *Crosby* proceedings, and the prosecutor did not appeal from that decision. (COA opinion, majority opinion, pp 10-11, 181a-182a.) As Mr. Wafer filed an application for leave to appeal in this Court on his other claims, the *Crosby* proceeding has not yet taken place. See MCR 7.215(F)(1)(a).

murder. (COA opinion, Servitto, J., partial dissent, p 3; 185a.)

On reconsideration, this Honorable Court directed oral argument on the double jeopardy issue from Mr. Wafer's application for leave to appeal and ordered supplemental briefing on "whether the defendant's convictions for second-degree murder, MCL 750.317, and statutory manslaughter, MCL 750.329(1), violate constitutional prohibitions against double jeopardy. See *People v Miller*, 498 Mich 13 (2015)."⁶ (*People v Wafer*, ___ Mich ___; 943 NW2d 379 (2020); 186a-187a). This case is to be argued in the same session with *People v Davis* (Docket No.160775). *Id.*

⁶ The Court maintained the denial of leave to appeal "with respect to the defendant's jury instruction and prosecutorial misconduct issues." (*People v Wafer*, ___ Mich ___; 943 NW2d 379 (2020); 186a-187a).

Arguments

- I. **Mr. Wafer's convictions and sentences for violations of both MCL 750.317 (second-degree murder) and MCL 750.329 (statutory manslaughter) for the same death are a double jeopardy violation. The manslaughter conviction must be set aside, and the case remanded for resentencing on the second-degree murder conviction.**

Issue Preservation

This issue was preserved in the trial court.⁷ Defense counsel objected both during the discussion of the final jury instructions, where the prosecution agreed one of the convictions would have to be set aside if the defendant was convicted of both counts, and at sentencing, where the prosecution changed its position and opposed the defense's objection.⁸ (X 126-128, 27a-30a; S 14-21, 149a-156a). At sentencing, defense counsel also objected to the scoring of PRV 7 at 10 points on the basis of the concurrent manslaughter conviction. (S 14-17, 21, 149a-151a, 156a). The trial court overruled the objections. From the trial court's comments, it appears the court applied the elements test of *Blockburger v US*, 284 US 299 (1932) and *People v Ream*, 481 Mich 223 (2008) and referenced the rule of *People v Doss*, 406 Mich 90 (1979), although the court did not use case names. (S 15-21, 150a-156a).

⁷ Even if the claim had not been preserved below, Mr. Wafer would still be entitled to relief. Mr. Wafer adopts the arguments made in the companion case, *People v Joel Eusevio Davis*, Supplemental Brief after Remand, Issue II. The Wayne County Prosecutor is also counsel for Appellee in *People v Joel Eusevio Davis*, MSC No. 160775, and was e-served with Mr. Davis' Supplemental Brief after Remand.

⁸ The prosecutor charged Mr. Wafer with second-degree murder and statutory manslaughter; the prosecutor also requested and received instruction on common-law involuntary manslaughter as a necessarily included lesser offense of second-degree murder. (See Felony Information; X 126-128, 166-167, 27a-30a, 67a-68a).

Standard of Review

This Court reviews statutory construction and constitutional law questions de novo. *People v Miller*, 498 Mich 13, 17-18 (2015).

Discussion

The Legislature does not intend for a person to be convicted and sentenced for two homicide offenses for the death of one person.⁹ A person cannot simultaneously act with malice and without malice in committing the same act against the same person, here discharging the shotgun. The Legislature knew the common law provided that murder is a killing committed with malice when it enacted the second-degree murder statute, incorporating the common law elements, and when it enacted MCL 750.329 providing that statutory manslaughter was instead a killing done “without malice.” The Legislature made these two offenses mutually exclusive. Mr. Wafer’s convictions and sentences for both second-degree murder and statutory manslaughter in the killing of the same person thus violate the state and federal prohibitions against double jeopardy. The appropriate remedy is to vacate the less serious conviction and remand for resentencing on the greater one.

⁹ For instance, the Legislature does not intend for a defendant to receive separate convictions and sentences for both first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b), for the same single killing despite their differing elements. *People v Perry*, 497 Mich 1023 (2015); *People v Orlewicz*, 293 Mich App 96, 112 (2011); *People v Bigelow*, 229 Mich App 218 (1998). To remedy the double jeopardy violation in those situations, the courts modify defendant's judgment of sentence to specify that defendant's conviction and single sentence of life without parole is for one count of first-degree murder supported by two theories: premeditated murder and felony murder. *Id.*

The United States and Michigan Constitutions each provide that no person may be put in jeopardy twice for the same offense. US Const, Ams V,¹⁰ XIV¹¹; Const 1963, art 1, § 15.¹² Mr. Wafer's case involves the multiple punishments strand. See *Miller*, 498 Mich at 17.

As this Court explained in *Miller*, 498 Mich at 17-18:

The multiple punishments strand of double jeopardy “is designed to ensure that courts confine their sentences to the limits established by the Legislature” and therefore acts as a “restraint on the prosecutor and the Courts.” The multiple punishments strand is not violated “[w]here ‘a legislature specifically authorizes cumulative punishment under two statutes. . . .’” Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial. “Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.” (internal citations omitted).

¹⁰ US Const, Am V, provides in pertinent part that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb. . . .”

¹¹ The Fifth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *People v Ream*, 481 Mich 223, 255 (2008); *Benton v Maryland*, 395 US 784, 795-796 (1969).

¹² Const 1963, art 1, § 15 provides in pertinent part that “[n]o person shall be subject for the same offense to be twice put in jeopardy.”

If the Legislature's intent is clear from the statutory language, the courts must abide by it. Only if the Legislature's intent is not clear from the statutory language should courts look to the *Blockburger/Ream*¹³ elements test.¹⁴ *Id.* at 18-19.

A. **The statutory language “but without malice” in MCL 750.329 must be given meaning and effect. The Legislature intended second-degree murder and statutory manslaughter to be mutually exclusive offenses.**

It is plain from the statutes that the Legislature did not intend multiple punishments for second-degree murder and statutory manslaughter in the death of the same person. So the *Blockburger/Ream* elements test is not applicable. The Court of Appeals' majority opinion incorrectly applied this Court's rules for statutory interpretation, improperly rendering language in MCL 750.329 (statutory manslaughter) nugatory.

MCL 750.317 (second-degree murder) provides:

Second degree murder--All other kinds of murder [meaning other than first-degree, MCL 750.316] shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

MCL 750.329 (statutory manslaughter) provides, in relevant part:

“(1) A person who wounds, maims, or injures another person by discharging a firearm that is pointed or aimed intentionally **but without malice** at another person is guilty of manslaughter if the wounds, maiming, or injuries result in death.” (emphasis added).

¹³ *Blockburger v US*, 284 US 299 (1932); *People v Ream*, 481 Mich 223 (2008).

¹⁴ Under the *Blockburger/Ream* test it is not a violation of double jeopardy to convict a defendant of multiple offenses if “each of the offenses for which defendant was convicted has an element that the other does not. . . .” *Miller*, 498 Mich at 19-20.

Both MCL 750.317 and MCL 750.329 were enacted at the same time in 1931. 1931 PA 328, Eff. September 18, 1931. In 2005, MCL 750.329 was amended primarily to provide an exemption for peace officers performing their duties.¹⁵ 2005 PA 303, Eff. December 21, 2005. The “but without malice” language was retained. *Id.*

By 1931, when these statutes were enacted, common law had long provided that murder is an unlawful killing done with malice aforethought. *People v Scott*, 6 Mich 287, 292 (1859); *People v Potter*, 5 Mich. 1, 6 (1858). This Court presumes the Legislature knows the common law when it acts, and unless a statute clearly evinces an intent to overrule the common law, it is presumed that the Legislature intended to incorporate the common law into its enactment. *People v Moreno*, 491 Mich 38, 46 (2012); *Dawe v Dr Reuven Bar-Levav & Assoc PC*, 485 Mich 20, 28 (2010).

Because MCL 750.317 proscribes “murder” without providing a particularized definition, it retained the elements from the common law. *People v Reese*, 491 Mich 127, 140-142 (2012); *People v Riddle*, 467 Mich 116, 125-126 (2002). Thus, the elements of second-degree murder under MCL 750.317 remain: (1) a death, (2) caused by defendant’s act, (3) **with malice**, and (4) without justification. *People v Mendoza*, 468 Mich 527, 534 (2003), citing *People v Goecke*, 457 Mich 442, 463-464 (1998); see M Crim JI 16.5.

¹⁵ Subsection (2) was added to MCL 750.329 and provides: “This section does not apply to a peace officer of this state or another state, or of a local unit of government of this state or another state, or of the United States, performing his or her duties as a peace officer. As used in this section, “peace officer” means that term as defined in section 215.”

“Malice” had acquired a particular and appropriate meaning in the common law as defined by this Court, when the Legislature chose to use the phrase “but without malice” in MCL 750.329. Where this Court has defined a term or phrase and that term or phrase has acquired a particular and appropriate meaning in the law, it becomes a legal term of art. *People v Babcock*, 469 Mich 247, 257-258 (2003). Where the Legislature then chooses to use that legal term of art in a statute, the term must be construed and understood according to the particular and appropriate meaning it has attained. *Id.*; see *Ford Motor Co v Woodhaven*, 475 Mich 425, 439 (2006).

Where statutory language is clear, it must be followed and further judicial construction is not necessary or allowed. *People v Pinkney*, 501 Mich 259, 268 (2018). The words used in a statute are the best indicator of the Legislature's intent. *People v Bonilla-Machodo*, 489 Mich 412, 421-422 (2011). In interpreting a statute, effect must be given to every word, phrase, and clause and a court must avoid rendering any part of the statute surplusage or nugatory. *Miller, supra* at 25; *Bonilla-Machodo*, 489 Mich at 422. When interpreting different statutes that use different language attention must be paid so that a court does not construe one or both in a way that treats any word as surplusage or nugatory. *People v McGraw*, 484 Mich 120, 126 (2009); *People v Carter*, 503 Mich 221, 229 n 29 (2019).

The Legislature did not intend for a person to be convicted and punished under both MCL 750.317 (second-degree murder) and MCL 750.329 (statutory manslaughter) for the same death, as evidenced by the plain language the Legislature used in MCL 750.329 (“but without malice”). The Legislature knew the common law

defined murder as requiring malice and chose not to alter that definition when it enacted MCL 750.317. The Legislature chose to use the language “but without malice” when it enacted MCL 750.329 and to retain that language when the statute was later amended. The two offense statutes are mutually exclusive. As this Court noted in *People v Doss*, 406 Mich 90, 98-99 (1979): “‘Malice’ or ‘malice aforethought’ is that quality which distinguishes murder from manslaughter” and “it is manifestly impossible for an act to be at the same time malicious and free from malice.”

In her dissenting opinion in this case, Judge Servitto applied these principles of statutory interpretation explained:

I disagree, however, with the majority’s conclusion that neither the statute governing second degree murder, MCL 750.317, nor the statute governing involuntary manslaughter, MCL 750.329(1), plainly evince a legislative intent with respect to multiple punishments. Because of my disagreement, I would further find that the test articulated in *Ream, supra*, need not be utilized.

There would have been no need to add the limitation “but without malice” in the manslaughter statute had the Legislature intended to authorize dual punishments for both second degree murder and manslaughter under these circumstances. Rather, the Legislature would have simply remained silent on the *mens rea* element. The fact that it did not do so supports a conclusion that the Legislature expressed a clear intent in the manslaughter statute to prohibit multiple punishments for manslaughter and murder. See *Miller*, 498 Mich at 18. And, we must presume that the Legislature “knows of the existence of the common law when it acts.” *People v Moreno*, 491 Mich 38, 46; 814 NW2d 624 (2012). Thus, in enacting the manslaughter statute, the Legislature was well aware that second degree murder, at common law and continuing today, required a malice

element and expressly and purposely excluded this element from the manslaughter statute as a distinguishing feature.

. . . . Defendant's convictions of and punishments for both second-degree murder and manslaughter in the death of one person thus violated the multiple punishments strand of double jeopardy. *Miller*, 498 Mich at 18. [COA opinion, Servitto, J., partial dissent, pp 1-3 (emphasis added)].

The majority failed to give meaning and effect to the statutory language “but without malice” in MCL 750.329. Instead the majority rendered that statutory language nugatory.

B. This Court's precedents in *People v Strawther*, *People v Smith*, and *People v Doss* do not compel a different conclusion. In fact, they support the conclusion that convictions and punishments for both murder and statutory manslaughter for the same death are prohibited, because to hold otherwise given those decisions would mean that the words “but without malice” in MCL 750.329 have been entirely read out of the statute by the judiciary.

The Court of Appeals' majority, in holding there was not a double jeopardy violation here, relied in part on this Court's decisions in *People v Strawther*, 480 Mich 900 (2007) and *People v Smith*, 478 Mich 64 (2007). (COA opinion, majority opinion, p 9; 180a). Neither of those decisions preclude relief here. *Strawther* was decided solely on the *Blockburger/Ream* elements test, without examining the mutually exclusive statutory language, before *Miller* made clear that a court's first responsibility is to examine the statutory language to discern whether the Legislature intended multiple punishments. *Smith* addressed a different question entirely, not double jeopardy.

This Court's one-paragraph order in *People v Strawther*, 480 Mich 900 (2007) held that there was no double jeopardy violation "[b]ecause the crimes have different elements, the defendant may be punished for each. *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007)." In *Strawther*, this Court did not examine the mutually exclusive language of the statutes at issue, MCL 750.84, assault with intent to commit great bodily harm ("with the intent to commit great bodily harm less than murder") and MCL 750.82, felonious assault ("without intending to commit murder or to inflict great bodily harm less than murder"). The reference to the different elements and citation to *Smith*, 478 Mich 292, is a reference to the *Blockburger* test.

But *Strawther* pre-dated *Miller*, in which this Court instructed that first statutory language must be examined to determine legislative intent, and that the *Blockburger/Ream* test only applies if legislative intent is unclear from the statutory language. Thus, *Strawther* is no longer controlling after *Miller*.

In *People v Smith*, 478 Mich 64 (2007), this Court held that statutory manslaughter, MCL 750.329, is not a necessarily included lesser offense of second-degree murder. The Court found that "because it contains elements—that the death resulted from the discharge of a firearm and that the defendant intentionally pointed the firearm at the victim—that are not subsumed in the elements of second-degree murder", statutory manslaughter, MCL 750.329, is not an "inferior" offense of second-

degree murder under MCL 768.32(1),¹⁶ which governs when a jury may be instructed on lesser offenses than those charged.¹⁷

This Court wrongly decided *Smith*. In *People v Mendoza*, 468 Mich 527 (2003), this Court held that manslaughter in all of its forms is an inferior and necessarily included lesser offense of murder. Manslaughter is simply murder without malice. *Id.* at 534. The *Mendoza* court specifically referenced MCL 750.329 as one of the forms of manslaughter that is inferior to murder under MCL 768.32(1). *Id.* at 536, n 7. In *Smith*, the requested jury instruction should have been given because “statutory manslaughter is a specific instance of the general crime of manslaughter set forth in MCL 750.321 and is subject to the same prison term as any other form of manslaughter recognized at common law. . . . [S]tatutory manslaughter under MCL 750.329(1) is simply one form of manslaughter recognized in this state. . . .” *Smith*, 478 Mich at 83 (Markman, J. concurring).¹⁸ Moreover, this Court’s current construction of MCL 768.32 misinterprets the statute’s plain language and

¹⁶ MCL 768.32(1) provides: “Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.”

¹⁷ In *Smith*, the defendant was charged with second-degree murder and felony-firearm. The trial court instructed the jury on the lesser offense of common-law involuntary manslaughter based on gross negligence. The trial court denied defendant's request to instruct on statutory manslaughter under MCL 750.329.

¹⁸ Justice Markman would have held that there was error in denying the defendant’s request for an instruction on statutory manslaughter but that the error was harmless. *Smith*, 478 Mich at 74, (Markman, J., concurring).

contravenes this Court's precedents on the relationship between murder and manslaughter. *Smith*, 478 Mich at 86-87 (Cavanagh, J., dissenting).

Regardless, *Smith* is not applicable to the present question as it did not involve a double jeopardy issue. In *Smith*, this Court answered only the analytically distinct question of whether an offense was a cognate lesser or a necessarily included lesser offense of another. This Court can leave the recurring question of the proper interpretation of MCL 786.32 for another day. See *People v Haynie*, ___ Mich ___; 943 NW2d 383, 385-389 (Clement, J., concurring).

In overruling the defense's objections in the trial court, the trial judge here alluded to the rule of *People v Doss*, 406 Mich 90 (1979), which held that a lack of malice need not be presented to the factfinder and proven to sustain a conviction for statutory manslaughter. (S 17, 21).¹⁹ But as with *Smith*, *Doss* did not address a double jeopardy question.

In *Doss*, this Court addressed the analytically distinct question of whether the statutory language "without malice" was an element of the offense that the People must prove. There, the defendant was charged with a single count of statutory

¹⁹ The trial judge stated:

"...without malice, that's just something that needn't be proved." (S 17, 152a).

"And whether or not their representations are correct or not, I'm still bound to follow the law. And in this case they are different charges. They are different elements. I don't, and I was just reviewing firearm intentionally aimed. I don't see anything that--I think that fact that it says without malice is just something that needn't be proved. It doesn't mean that without malice should have been proven." (S 21, 156a).

manslaughter, MCL 750.329. The Court of Appeals held that the Information should have been quashed because the People had failed to establish an essential element of the statutory offense, i.e. that the defendant acted “without malice”. *Id.* at 96-98. This Court reversed, holding that the prosecutor is not required to prove an absence of malice because crimes do not have negative elements that must be proven. *Id.* at 99.

Doss did not even address the question of how a jury should be instructed when the defendant is charged with both murder and statutory manslaughter, rather than a solitary charge of statutory manslaughter. But the standard criminal jury instruction omits the requirement that jurors be informed of the contradictory and mutually exclusive *mens rea* provisions between murder and statutory manslaughter, even when the defendant has been charged with both. MI Crim JI 16.11.²⁰ (See X 165-168, 66a- 69a).

²⁰ MI Crim JI 16.11 provides:

- (1) [The defendant is charged with the crime of _____ / You may also consider the lesser charge of] involuntary manslaughter. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
- (2) First, that the defendant caused the death of [name deceased], that is, [name deceased] died as a result of [state alleged act causing death].
- (3) Second, that death resulted from the discharge of a firearm. [A firearm is an instrument from which (shot / a bullet) is propelled by the explosion of gunpowder.]
- (4) Third, at the time the firearm went off, the defendant was pointing it at [name deceased].
- (5) Fourth, at that time, the defendant intended to point the firearm at [name deceased].
- [(6) Fifth, that the defendant caused the death without lawful excuse or justification.]

It is inconsistent with a defendant's state and federal rights to a jury trial and due process to have jurors unknowingly convict a defendant of mutually exclusive offenses, where a conviction on two separately-charged counts results in increased punishment for the defendant. US Const VI, XIV; Const 1963, art 1, § 20; see *People v Lockridge*, 498 Mich 358, 370 (2015). If the trial court instructed jurors about the mutually exclusive statutory language when defendants are charged with both murder and statutory manslaughter, juries most likely would not convict a defendant of both offenses. Mr. Wafer joins with Defendant-Appellant Joel Eusevio Davis, in the companion case, in asking this Court to take this opportunity to clarify that *Doss* does not extend beyond its narrow circumstances of a single charge, so that conflicting *mens rea* provisions are not hidden from juries in cases involving multiple charges.²¹

In MCL 750.317 and MCL 750.329, the Legislature sought to retain Michigan's traditional distinction between murder and manslaughter. Even in *Doss* this Court noted, "[I]t is manifestly impossible for an act to be at the same time malicious and free from malice." *Doss* at 98. After this Court's decisions in *Doss* and *Smith*, if the phrase "but without malice" in MCL 750.329 is to have any meaning, it must be that a person cannot be punished for both murder and statutory manslaughter for the same killing. Otherwise, this Court will have rendered that statutory language

²¹ See Defendant-Appellant Joel Eusevio Davis' Supplemental Brief after Remand, Issue I(D), with which Mr. Wafer agrees and adopts. The Wayne County Prosecutor is also counsel for Appellee in *People v Joel Eusovio Davis*, MSC No. 160775, and was e-served with Mr. Davis' Supplemental Brief after Remand.

completely meaningless and unenforceable without ever having concluded that the Legislature committed some constitutional violation by including it.²²

C. The proper remedy is to vacate the manslaughter conviction and to remand for resentencing on the remaining greater offense of second-degree murder.

This Court must vacate Mr. Wafer's manslaughter conviction and remand for resentencing on the remaining greater offense of second-degree murder. *Miller*, 498 Mich at 26-27. The existence of the manslaughter conviction is its own harm, as amongst other things it carries the stigma associated with any criminal conviction, it can make the defendant appear less deserving of parole, it can subject the defendant to all sorts of collateral consequences, and it can potentially expose the defendant to more severe future consequences under recidivism statutes. *US v Ball*, 470 US 856, 864-865 (1985). In addition, resentencing is necessary because the second-degree murder sentence was impacted by the consideration of the unconstitutional dual conviction of manslaughter, i.e. affected by inaccurate information or based on a constitutionally impermissible ground. *People v Jackson*, 487 Mich 783 (2010); MCL 769.34(10); *People v Francisco*, 474 Mich 82 (2006); *People v Miles*, 454 Mich 90, 96 (1997); see also *People v Moore*, 391 Mich 426, 436-440 (1976).

Further, Mr. Wafer is entitled to resentencing on the second-degree murder conviction because the sentencing guidelines range for that conviction was improperly raised from A-II (144-240 months) to C-II (180-300 months/life) when the

²² This Court has authority to strike unconstitutional statutes or provisions within statutes, i.e., to render them inoperative. See *Lockridge*, 498 Mich at 391.

trial court scored PRV 7 at 10 points for the concurrent manslaughter conviction.²³ This is a separate and distinct ground for resentencing under MCL 769.34(10).²⁴ *Jackson*, 487 Mich 783; *Francisco*, 474 Mich 82.

Sentencing here occurred prior to this Court's opinion in *People v Lockridge*, 498 Mich 358, 394 (2015), in which this Court held that the sentencing guidelines ranges could only be used in an advisory capacity. Mr. Wafer asked for a downward departure. (S 28, 30-37, 157a, 159a-166a). Operating under the belief that it could not depart downward from the calculated guidelines range of 180-300 months/or parolable life (C-II)²⁵ absent a substantial and compelling reason, the trial court imposed a sentence for second-degree murder that was at the very bottom of the range.²⁶ (S 38-40, 167a-169a; Judgment of Sentence; 171a; SIR, 170a). Without the scoring of the unconstitutional manslaughter conviction, the correct applicable sentencing guidelines range is lower, A-II (144-240), and Mr. Wafer is thus entitled to resentencing. *Jackson*, 487 Mich 783; *Francisco*, 474 Mich 82; *People v Geddert*,

²³ See MCL 777.61 (second-degree murder sentencing grid); SIR, 170a. Under PRV 7 (Subsequent or concurrent felony convictions), one concurrent conviction is scored at 10 points. MCL 777.57(1)(b). A felony firearm conviction cannot be scored. MCL 777.57(2)(b).

²⁴ Trial defense counsel preserved the objection to the scoring of PRV 7 at sentencing. (S 14-17, 21, 149a-151a, 156a). In addition, Mr. Wafer made his request for resentencing on this ground in his brief on appeal in the Court of Appeals both in the body of the brief, pp 46-47, and in his request for relief, p 50. This was also sufficient to preserve the request for resentencing on this ground where the issue was not ripe until the manslaughter conviction ordered vacated. *Jackson*, 487 Mich at 795-801.

²⁵ See SIR, 170a.

²⁶ The Court of Appeals remanded for *Crosby* proceedings, and the prosecutor did not appeal from that decision. (COA opinion, majority opinion, pp 10-11, 181a-182a.) As Mr. Wafer filed an application for leave to appeal in this Court on his other claims, the *Crosby* proceedings have not yet taken place. See MCR 7.215(F)(1)(a).

500 Mich 859 (2016).²⁷ Mr. Wafer asks this Court to vacate the statutory manslaughter conviction, MCL 750.329, and remand for resentencing on the second-degree murder conviction under the corrected lower sentencing guidelines range.²⁸

Summary and Request for Relief

For the foregoing reasons, **Theodore Paul Wafer** asks that this Honorable Court vacate his manslaughter conviction and remand for resentencing on the remaining convictions. In the alternative, this Court should grant leave to appeal.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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²⁷ In *Geddert* this Court explained that the rule of *Francisco* still stands after *Lockridge* : “Even though the guidelines ranges are now advisory, the scoring of the guidelines themselves is mandatory, and the OV’s must be assigned the highest number of points applicable. MCL 777.43(1); *People v Lockridge*, 498 Mich 358, 392 n 28, 870 NW2d 502 (2015). Because correcting the OV score would change the applicable guidelines range, resentencing is required. *People v Francisco*, 474 Mich 82, 711 NW2d 44 (2006).”

²⁸ The other remaining conviction, felony firearm, is a mandatory flat 2-year consecutive term. MCL 750.227b.